Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1956

No. 293

EDWARD J. FITZGERALD,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

No opinion was written in the District Court. The opinion of the Court of Appeals, dated July 6, 1956, not yet reported, is set forth as Appendix I herein.

Jurisdiction

The judgment of the Court of Appeals was made and entered on July 6, 1956. The jurisdiction of this court is invoked under Title 28 U. S. C. Sec. 1254(1).

The Constitutional and Statutory Provisions and Rule Involved

This case involves Article II, Sec. 2 and the Fifth Amendment of the Constitution of the United States; Title 18 U. S. C. Sec. 3486; Title 18 U. S. C. Sec. 401; and Rule

42 of the Federal Rules of Criminal Procedure. The relevant portions of the constitutional provisions and the text of the statutes and rule, so far as pertinent, are set forth as Appendix II herein.

Statement of the Case

1. Petitioner was convicted on August 18, 1955 of contempt of court for failure to answer questions put to him before a grand jury in the Southern District of New York on July 29, 1955 (App. 115a)* following an order entered July 25, 1955 under the Compulsory Testimony Act of 1954 (App. 10a) directing him to testify.

The acting United States Attorney for the Southern District of New York, Lloyd F. MacMahon, made written application for the compulsory testimony order (App. 2a) upon purported notice to the petitioner (App. 13a). The notice consisted of mailing a copy of the written application, so that it was received by petitioner's counsel on Friday, July 22, 1955, with a copy of a proposed order and a letter advising that such documents would be presented to United States District Judge Archie O. Dawson on Monday, July 25th (App. 63a). The application recited that the grand jury was inquiring into espionage and conspiracy to commit espionage in time of war (App. 3a), and that the testimony of the petitioner concerning the matters under inquiry was in the judgment of Mr. MacMahon necessary to the public interest of the United States (App. 8a).

The petitioner's counsel attended on July 25th and argued his request for an adjournment. Notwithstanding counsel's plea that he was unprepared with his opposition, Judge Dawson pressed for an immediate statement of the grounds of opposition (App. 23a-36a).

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* All page references are to the pages of the appendix to the petitioner's (appellant's brief) in the Court of Appeals.

The court, treating the request for an adjournment as if it were an argument on the merits, stated that he considered himself compelled to grant the application (App. 32a). The petitioner's counsel asked for an opportunity to make an offer of proof. The court denied the application and announced that he had signed the order on the bench (App. 36a).

As directed by Judge Dawson's order, the petitioner attended before the grand jury on July 29th, but he again asserted his constitutional privilege against self-incrimination in response to a number of questions (App. 93a-102a). On the same day, July 29th, Judge Dawson made an order directing the petitioner to show cause why he should not be adjudged in contempt for his refusal to answer such questions (App. 37a).

In preparation for the contempt hearing, petitioner caused subpoenas to be served on Herbert J. Brownell, Jr., J. Edgar Hoover and Elizabeth Bentley for the purpose of proving that this case does not come under the Compulsory Testimony Law of 1954, in that there was in fact no investigation of espionage or conspiracy to commit espionage being made by the grand jury (App. 54a), and that the United States Attorney had not in fact formed the required judgment as to the necessity of petitioner's testimony (App. 56a). All of the subpoenas were returnable on August 18, 1955 (App. 41a). United States District Judge Lawrence E. Walsh made an order on August 16, 1955 directing petitioner to show cause on August 17 why all of the subpoenas should not be quashed (App. 41a). After hearing argument, Judge Walsh granted the respondent's motion to quash the subpoenas (App. 81a) and endorsed his determination on the original papers. The following day, August 18th, the motion to punish for contempt was heard (App. 82a) and resulted in the petitioner's conviction (App. 104a), and his sentence to a term of six months imprisonment (App. 112a).

Petitioner submitted a number of affidavits in the court below, the contents of which are in this record as an offer of proof (App. 103a). As he was denied an opportunity to adduce the proof he offered upon the ground that such testimony "would make no difference", as Judge Dawson said (App. 36a), or would be of no interest to the court, as Judge Walsh said (App. 81a), and as the petitioner's allegations are not controverted in the record, it is fairly to be presumed upon review that petitioner would, if permitted, have been able to prove what he offered to prove. He offered to prove through Mr. MacMahon that there was no investigation of espionage being made by the grand jury which called him (App. 54a). He offered to prove by Mr. MacMahon and by Attorney General Brownell that they had not in fact formed the judgment that the testimony of the petitioner was necessary to the public interest on the subject of espionage (App. 57a, 62a). As the petitioner stated in his affidavit of August 17, 1955, he proposed to prove through Mr. MacMahon, Judge Brownell, J. Edgar Hoover and Elizabeth Bentley "that they know no facts tending to connect me with espionage".

The petitioner's efforts to establish a record before Judge Dawson in order to oppose the order compelling testimony were frustrated as premature. Judge Dawson said:

> "We cannot have the progress of grand jury proceedings determined on issues as to the good faith of the prosecuting official. If the prosecuting official is acting in bad faith, there will be remedies in the trial court, but at the present time the United States Attorney, a man of high character, states to me that it is his judgment that this testimony is necessary." (App. 35a)

But when petitioner offered his proof in defense of the contempt proceeding, he was again thwarted, as Judge Walsh said:

> "It is my understanding that Judge Dawson has ordered Mr. Fitzgerald to appear before the grand jury and to give testimony. I am not going to review Judge Dawson's order or its propriety. He has passed on that and that settles the question for me." (App. 81a)

Thus, in both tribunals in which the petitioner appeared he was denied an opportunity to prove that no factual basis for invocation of the Compulsory Testimony Law existed.

2. The application to Judge Dawson contained a list of questions which had been put to the petitioner in the grand jury room (App. 15a-20a). The order compelling testimony recited the application and then among the decretal paragraphs it directed:

> "ORDERED, subject to the provisions of Title 18, United States Code, Section 3486, as amended, that Edward J. Fitzgerald be and he hereby is instructed to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury:" (App. 12a)

The direction appears to be ambiguous, for the phrase "the questions propounded to him before the Grand Jury" did not necessarily refer to questions *previously propounded* but may with equal or superior grammatical validity have referred to questions *to be propounded*. That the decretal phrase is intended to be prospective rather than to refer to the questions set forth in the application is supported by three considerations: (1) that if it intended to refer to the questions already propounded and set forth in the application, it would have been a simple matter to have said so; (2) the companion directory phrase is clearly prospective, "and to testify and produce evidence"; and (3) that the order was signed without any argument or

litigation as to the propriety of the questions and indeed with no oral reference to them whatsoever. Moreover, the respondent advanced the argument in the Court of Appeals that no notice of an application for a compulsory testimony order is required to be given to a witness: thus if the order does not recite specific questions and the witness is not entitled to notice of the application containing questions already put, then surely the order gives him no notice of a direction to answer specific questions.

The order having been made, the petitioner again refused to answer substantially the same questions before the grand jury. Notwithstanding that no court had ruled on the propriety of the unanswered questions, such refusal has been adjudged contempt of court.

The petitioner's appearance before the grand jury on July 20, 1955 was the first step in the proceeding to obtain a compulsory testimony order (App. 15a). It has not been suggested that any refusal to answer on that date was unwarranted or that following such hearing application might have been made to compel answers. The order of July 25th placed the imprimatur of the court on the applicability of the Compulsory Testimony Law. When the petitioner appeared before the grand jury on July 29th a new legal situation had arisen (assuming the validity of the application of the statute), *viz.*, that the petitioner was now required to testify under protection of immunity as to matters involving wartime espionage (App. 11a). There was no advance determination as to the validity or propriety of any particular question that might be put before the grand jury. The order compelling testimony had no such purpose or effect. If it was valid, its only effect was to assure immunity to a witness who gave testimony pursuant to it. This view is supported both by the direction in the order, quoted *supra*, and the language of the statute, which authorizes "application to the court that the witness shall be instructed to testify or produce evidence subject to

the provisions of this section, and upon order of the court such witness shall not be excused from testifying or producing * * *".

Selection of the questions is solely within the province of the grand jury and the prosecutor. A refusal to answer any one or more questions before the grand jury, after the compulsory testimony order, could lawfully give rise only to a new application to direct answers to the specific questions or categories of questions refused. At that time and in that forum the petitioner could have litigated his objections to questions which did not properly come within the statute, and he could have obtained a ruling thereon. If after obtaining such an adjudication the petitioner had persisted in refusing to answer any question or category of questions so directed to be answered, his conduct would clearly have been contemptuous of court, assuming the validity of the original order compelling testimony.

However, the petitioner obtained no such opportunity. The refusal to answer questions on July 29th, following the general compulsory testimony order, and without any adjudication as to the propriety of the questions put, has been held to be criminal contempt of court.

3. The petitioner said in his affidavit of August 18, 1955, submitted to the District Court:

> "I wish to make the record very clear on one matter. I repudiate with resentment the government's offer to me of immunity from prosecution for any crime. The government has not formally charged me with any crime or prosecuted me. I seek no pardon or amnesty or immunity for any act of mine. I reject unconditionally the immunity tendered to me in the grand jury proceedings." (App. 68a)

That expression was frankly intended to bring this case within the rule of *Burdick* v. *United States*, 236 U. S. 79,

hereinafter discussed. For the reasons set out below, the petitioner contends that immunity conferred by a United States Attorney on a selected individual has more of the attributes of a presidential pardon such as was considered in the *Burdick* case than legislative immunity which was distinguished from a pardon in that case. This follows not only from a comparison of the Compulsory Testimony Act of 1954 with the Compulsory Testimony Law of 1893 considered in *Burdick*, but also from the peculiar facts of the present case.

As we shall see, the inference of guilt flowing from acceptance of a pardon is the basic reason for allowing rejection. Whether or not an inference of guilt arises from the selective nature and the grounds of the United States Attorney's grant of immunity under this act, the history of accusations leveled against this petitioner by the government leaves no doubt as to the inference which would be drawn here. On July 30, 1953 a special report of the Internal Security Subcommittee of the Senate Judiciary Committee asserted that petitioner was one of eighty collaborators of Elizabeth Bentley in an alleged espionage career which she had revealed to the F. B. I. (App. 69a). On November 17, 1953 the committee by its chairman asserted that it had been "working with particularity on the cases of nine persons" of whom petitioner was one, all alleged spies (App. 69a). That particular hearing had been called for the purpose of taking the testimony of Attorney General Brownell and F. B. I. Director Hoover. Both of them testified in the proceedings, which were broadcast by radio and television. In their testimony petitioner was branded before the people of the United States as a spy, notwithstanding that he had never been convicted or tried or indicted for espionage (App. 69a).

Moreover, the statements made by the Special Assistant Attorney General, Mr. Taylor, to petitioner in the grand

jury room emphasized the underlying charge that petitioner was guilty of crime. He said:

> "The order compelling your testimony here today was secured, perhaps with reluctance on the part of the Department of Justice. We realize it's a serious choice to make, to determine to immunize a person we have reason to believe has committed espionage." (App. 91a)

He added:

> "* * * we have decided to forego the opportunity to prosecute you for espionage by bringing you here pursuant to the provisions of the immunity statute." (App. 91a)

Mr. Taylor continued in the same vein, assuring petitioner that he was there presented with an opportunity to prove his "innocence" (App. 92a).

Petitioner, regarding the grant of immunity under the Compulsory Testimony Act of 1954 as equivalent to an executive pardon, and considering that acceptance by him would result in an inference of guilt, scornfully rejected it. Consequently, he cannot be compelled to give incriminating testimony under the rule of the *Burdick* case, as we argue below.

4. The language of the application (App. 3a) and the questions put in the grand jury room (App. 15a-20a) reveal that the acts alleged to be under investigation all occurred during the years 1941-1945. From the statement in the application that the alleged investigation is into "wartime espionage" and as the years involved in the questions are only the war years, it is plain that the alleged investigation covers acts and associations ten years old and more.

This court said in *United States* v. *Ullmann*:

> "The immunity act is concerned with national security."

It was never intended that the act be exploited for settling old scores that have no present relation to national security. The legislative history supports the view that Congress consented to grant to the Department of Justice the immense power to immunize criminals from prosecution on the assumption that such price had to be paid for the defense of the republic.

Petitioner does not argue that only investigation of an incomplete crime may have the benefit of the statute, for obviously that would be absurd. But it is submitted that the alleged investigation for which the Department of Justice seeks to invoke the statute must appear to have some relation to the defense of national security. In this case the investigation, if there is any, is plainly for the purpose of punishing acts all of which, if committed at all, were completed a decade ago.

Questions Presented

1. Whether the due process clause of the Fifth Amendment requires that the assertion by the United States Attorney of the existence of a national security investigation and as to the fact of his "judgment" concerning the necessity of a witness's testimony, be subject to judicial review when challenged.

2. Whether the due process clause of the Fifth Amendment requires that a witness receive due notice and a hearing before a compulsory testimony order can be issued or enforced against him.

3. Whether the due process clause of the Fifth Amendment requires that a specific direction with respect to each

question or category of questions be made by a court before refusal to answer can be held to be punishable as contempt of court.

4. Whether the petitioner under the circumstances here shown had a right under the Fifth Amendment to decline the proffered immunity and retain his privilege against self-incrimination.

5. Whether the statute can be applied to an alleged investigation of espionage which bears no relation to any present threat to the national security.

Reasons for Granting the Writ

Ullmann v. *United States* is not determinative of the questions presented by this petition. That case decided only the question of constitutionality of the statute, and no other question was presented there. Mr. Justice Frankfurter, writing for the majority, said that "four major questions" were raised by the appeal. He designated them as whether the immunity provided by the act was as broad as the Fifth Amendment privilege; whether the act unconstitutionally conferred on the district judge the power to adjudicate immunity; whether the statute provided immunity from state prosecution; and whether the Fifth Amendment prohibits compulsion of self-incriminating testimony notwithstanding the grant of immunity.

All those questions went to the constitutional validity of the act to authorize compulsion of testimony, "assuming", as Mr. Justice Frankfurter said, "that the statutory requirements are met".

Ullmann did not present any questions regarding application of the act to him. In the marginal footnote at the conclusion of the majority opinion, Ullmann's counsel is

quoted as having urged in his defense of the contempt prosecution,

> "all of the grounds we urged before Judge Weinfeld in opposition to the statute, in support of our contention that the statute was unconstitutional. We will rest on that basis in the Appellate Courts."

This is only the second case to arise under the Compulsory Testimony Act of 1954 since its enactment. It is the first one which presents questions of constitutionality of application. While in *Ullmann* this court determined the scope of the district judge's jurisdiction under the statute, which is to ascertain whether the statutory requirements have been complied with, the questions here presented concern the Fifth Amendment requirements of notice, hearing and litigation in the proceeding before the district judge.

All of the questions raised on this petition are based on the assumption that the statute is constitutional. This case starts where *Ullmann* ends.

I

The ruling below extends the power of the Justice Department in derogation of the Fifth Amendment beyond the limits permitted by the ruling of this court in the *Ullmann* case. If the mere assertion by the United States Attorney and a stamp of approval by the Attorney General are sufficient to require the district judge to find as a fact that a national security investigation is in progress and that the required judgment has been formed, and if neither of those assertions may lawfully be contested by the witness, then the district judge is shorn of jurisdiction to ascertain whether the statutory facts exist. Instead, he is foreclosed from taking testimony or exercising his judicial function in any aspect. If the ruling of the court below be correct, it is difficult to imagine why the statute pro-

vides for an order at all. The mere filing of such an affidavit would have the same effect as handing it to a judge. An order is not necessary for the purpose of procuring the attendance of the witness before a grand jury, for a subpoena issued by the United States Attorney would have the same force.

The ruling of this court in *Ullmann* gave effect to the statutory provision for an order to be made by the district judge by holding that the statute gave the judge a true judicial function, *viz.*, "to ascertain" whether the statutory requirements have been met.

An application to a district judge under the statute is a proceeding against the liberty of a witness. A compulsory testimony order deprives him of the right to silence which is guaranteed to his fellow-citizens by the Constitution. It exposes him to contempt prosecution for doing that which other witnesses may do with impunity. Consequently, an application for a compulsory testimony order is a proceeding in which the witness is entitled to notice and a hearing.

As was said in *Clarksburg-Columbus Short Route R. Co. v. Woodring*, 89 F. 2d 788, 790, reversed on other grounds, 302 U. S. 658:

> "The right to notice and hearing is imperative in judicial or quasi-judicial proceedings. It is not important that in this instance a hearing is not expressly enjoined by the statute. The right is constitutional."

The respondent contends that no notice of an application for a compulsory testimony order need be given the witness because the statute does not provide for any. The government argues that such an order is similar to a warrant which is granted *ex parte*. To this argument there are two answers in addition to the rule expressed in the

above case (1) that even an *ex parte* order or warrant is subject o the right of a party adversely affected to move to vacate on proper grounds, and (2) that in this case the order *was* applied for on purported notice, however inadequate, and the order, prepared by the respondent, recites that it was granted on notice (App. 10a). The record in the *Ullmann* case reveals that there too the government in the course of argument contended that notice was not required, but Weinfeld, *J.* overruled that contention and stated that he would not grant the order until *Ullmann* had had full opportunity to oppose it.

The gravamen of the denial of a hearing below was the district judge's ruling that petitioner would not be permitted to put in issue the assertions contained in the application (App 35a). The holding was that the existence of facts authorizing invocation of the Compulsory Testimony Law was not subject to judicial review even when challenged; that the mere assertion by the United States Attorney that such facts existed was conclusive upon the witness and the court.

Petitioner submits that the court below misconstrued the effect of the *Ullmann* decision. Ullmann asked the court to review the discretion of the United States Attorney. His affidavit in opposition to the United States Attorney's application was described by this court as having been submitted "in support of his plea for an exercise of discretion by the District Court". This petitioner made no such plea to the District Court. He contended simply that there was no investigation of espionage in progress notwithstanding the assertion to that effect in the application; and that in fact his testimony was not necessary to the public interest *in the judgment of the United States Attorney himself*. He offered to prove that the sole purpose of the Justice Department was to procure answers to political questions, and that spurious questions concerning fictitious espionage had been gratuitously im-

ported into the interrogation in order to pretend that this was a Compulsory Testimony Law situation. The petitioner sought to prove that the proceeding was a sham one and not within the statute.

If the Compulsory Testimony Law were construed so as to leave the petitioner helpless to combat an arbitrary exercise of power by an administrative officer, the statute would be unconstitutional. This court in the *Ullmann* case sustained the constitutionality of the statute against such an attack by holding that the District Court furnished a forum to determine the existence or non-existence of a statutory situation. Under the ruling in the *Ullmann* case the statute cannot be used as a weapon for an assault on civil liberties behind the camouflage of a pretended espionage investigation.

This court and many others have held repeatedly that the question whether administrative conduct is authorized is always subject to judicial review.

In *Equitable Loan Society, Inc.* v. *Bell*, 339 Pa. 449, 459-60, a State Secretary of Banking had been vested by statute with broad discretion to license and regulate. The court held that such statute was constitutional because:

> "The courts are always open to the victims of arbitrary or capricious action."

The court quoted from *Plymouth Coal Co.* v. *Pa.*, 232 U. S. 531, 547:

> "Where the statute provides no right of appeal to the courts from the determination of administrative tribunals, on constitutional grounds the right will be implied."

In *Toplis & Harding, Inc.* v. *Murphy*, 384 Ill. 463, 469-71, the court, citing *U. S.* v. *Lee Huen*, 118 Fed. 442, said:

> "A statute which vests in an administrative officer a discretion not only as to the administration

> of the act but also the determination as to what the law is, or which gives him an opportunity to apply it to one and refuse its application to another in like circumstances, constitutes unwarranted delegation of legislative authority. * * * Statutes containing similar provisions have been construed by this and other courts, and the holding has been that where discretion is vested in an officer or a commission to determine a fact to his or to its 'satisfaction', such discretion is not an arbitrary one but requires a sound discretion based upon satisfactory proof, and, if abused, is subject to review."

In *Seignious* v. *Rice*, 273 N. Y. 44, the New York Court of Appeals struck down a statute because it granted an administrative officer untrammeled discretion to discriminate between individuals. The court said at page 50:

> "We may assume that in the exercise of the powers which the Legislature has sought to confer on the Commissioner of Health he will act reasonably. None the less, if the statute is valid, he may pick and choose among individuals without formulating a general standard to be used in classification and without being bound by any standard formulated by the Legislature. That is not the grant of an incidental power; it is the delegation of a legislative power. It is indeed more than that; it is the grant of a power to discriminate in the matter of a man's right to continue to carry on his business, not only between classes of applicant, but even between individuals in accordance with his own judgment of what is best in that particular case. That the Legislature has no power to do. *People* v. *C. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916D, 1051."

Whether the required statutory facts exist to justify the United States Attorney's grant of immunity is no more to be protected from judicial review than whether facts exist to support regulatory or emergency legislation. But it has been uniformly held that the courts may always inquire whether the facts which are recited in a statute or which are essential to constitutionality actually exist.

In *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, this court said (p. 410):

> "Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the Legislature has transgressed the limits of its power. *Penna Coal Co.* v. *Mahon*, 43 S. Ct. 158, 260 U. S. 303, 413, 67 L. Ed. 322, 28 A. L. R. 1321. Invalidity may be shown by things which will be judicially noticed (*Quong-Wing* v. *Kirkendall*, 32 S. Ct. 192, 223 U. S. 59, 64, 56 L. Ed. 350) or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See Minnesota Rate Cases, 33 S. Ct. 729, 230 U. S. 352, 452, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18."

In *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, this court said that "a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared", citing *Block* v. *Hirsh*, 256 U. S. 154.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144, an act regulating a phase of the milk business was held constitutional, but that ruling would have been impossible if the courts had not been open for a judicial determination of relevant facts, as this court expressly stated (p. 152):

> "We may assume for present purposes that no pronouncement of a Legislature can forestall attack

> upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty, or property had a rational basis."

In clothing the Department of Justice with the immense power to immunize selected individuals against prosecution for crimes endangering the national security, Congress was careful to erect safeguards against the corrupt or arbitrary exercise thereof. Congress specified the kind of investigation and the kind of witness to whom the law might be applied and directed that whether the law is applicable must be determined by a district judge.

While in the present case the order in the District Court recited a finding of applicability, there is no record to support the finding. As described above, petitioner's offer of evidence on the subject was rejected.

The due process clause of the Fifth Amendment (as well as the statute read in the light of the *Ullmann* decision) required that due notice and a hearing be granted to petitioner; and further required that upon such hearing the petitioner be accorded an opportunity to challenge the applicability of the statute to him and to offer evidence in support of his challenge.

II

The power of a District Court to punish for contempt of court is defined by 18 U. S. C. Sec. 401.

The procedure for criminal contempt prosecutions is set out in Rule 42 of the Federal Rules of Criminal Procedure. Subdivision (a) provides for summary disposition where the misconduct was committed in the actual pres-

ence of the court. Subdivision (b) provides for disposition upon notice and hearing in all other cases of criminal contempt.

The respondent correctly treated the present case as falling under subdivision (b). The failure to answer questions before a grand jury is not contempt committed "in the actual presence of the court".

However, in order for the refusal to answer questions before a grand jury to be punishable as a contempt of court, it is a prerequisite that the court shall have ordered that answers be given to the precise questions or categories of questions refused. The contempt can be nothing less than disobedience of the court. Mere disobedience of a prosecutor or a grand jury is not contempt of court.

As outlined in the Statement of the Case, *supra*, the application for a compulsory testimony order against the petitioner following his refusal to answer questions in the grand jury room did not raise issues as to the propriety of such refusals. Quite the contrary, the petitioner's right to refuse to answer grand jury questions on July 20th was recognized by the respondent at the time of the July 25th application. The only effect of the compulsory testimony order was to create a legal situation in which, if the order were valid, a plea of self-incrimination would no longer be available to the petitioner with respect to questions coming within the area of immunization. The questions to be put remained within the province of the prosecutor and the grand jury to determine. The questions then put to the petitioner were those selected by the prosecutor and the grand jury. The court had not determined which questions were answerable and which were not.

Nevertheless, this case then proceeded on the theory that the refusal to answer grand jury questions had been converted to a contempt of court by the general immunity order. The view of the court below was in substance that the mere direction to answer all questions relating to war-

time espionage before the grand jury contained in the July 25th order of Judge Dawson was sufficient, without more, to convert every question thereafter put by the prosecutor in the grand jury room into a judicial direction to answer.

Under the rule expressed by the First Circuit in *Carlson* v. *United States*, 209 F. 2d 209, the petitioner's refusals to answer grand jury questions both on July 20th and on July 29th were not, and could not be, contempt of court, as there had been no judicial direction with respect to the questions refused. If, as is apparently conceded, the petitioner had the right to assert the Fifth Amendment on July 20th, the maximum effect of the immunity order was to deny him that right when he testified on July 29th. Even if such assertion was wrongful and was made in bad faith, it was not contempt of court.

> "Furthermore, in our opinion, it is clearly to be deduced from Ex parte Hudgings, 1919, 249 U. S. 378, and In re Michael, 1945, 326 U. S. 224, that even where a witness before a grand jury declines to answer on account of the privilege against self-incrimination, claimed *in bad faith*, such conduct if and of itself does not constitute misbehavior in the presence of the court within the meaning of 18 U. S. C. Sec. 401" (*Carlson* v. *United States*, 209 F. 2d 209, 214). (Emphasis by the Court.)

The holding in the court below conflicts with that of the First Circuit in *Carlson* v. *United States*. That case reversed a contempt conviction for refusal to answer questions in a grand jury room upon the ground that such refusal did not constitute a contempt of court. Said the court in that case (p. 214):

> "The claim of privilege calls upon the judge to make a ruling whether the privilege was available in the circumstances presented; and if the judge thinks not, then he instructs the witness to answer.

> *A fortiori*, the same must be true where a witness before a grand jury erroneously but in good faith claims his privilege. The witness is in the grand jury room without the present aid of counsel, and with all the legal uncertainties as to when the privilege is available, when it has been 'waived', etc., it would not be surprising if a witness, who knows of his Fifth Amendment privilege in a general way, makes an erroneous claim of privilege. The refusal to answer, in such a situation, is not a criminal contempt of the court's authority. The grand jury, in that event, if it desires to pursue the matter further, must call on the assistance of the court to make a ruling whether the privilege is available and to instruct the witness to go back to the jury room and answer the question if the ruling is made that the privilege was improperly claimed."

The procedure to be followed by a district judge before whom a recalcitrant witness is brought by a grand jury is set out at length in the opinion.

As the order made by Judge Dawson did not contain, and could not conceivably contain, an advance ruling upon the propriety of questions to be put, the petitioner was entitled to an opportunity to submit his refusals to the district judge for a ruling as to the availability of the Fifth Amendment. If the ruling were adverse as to any or all questions, it would have been the petitioner's duty to return to the grand jury and answer the questions which the court had ruled he was required to answer.

The courts below hurdled the essential step of converting a refusal to answer a grand jury question into contempt of court. Apparently, the theory below was that the compulsory testimony order rendered all refusals automatically contemptuous. That, it is submitted, was error.

III

Whether a witness to whom immunity is offered under the Compulsory Testimony Law of 1954 has a right to refuse it and retain his privilege against self-incrimination is a novel question arising under a novel statute. The question did not arise in the *Ullmann* case because Ullmann did not reject the immunity and because he did not claim the right to do so.

Burdick v. *United States*, 236 U. S. 79, held that a pardon was ineffectual if not accepted but that legislative immunity required no acceptance. The legislative immunity discussed by this court in the *Burdick* case was the Compulsory Testimony Act of 1893, the same statute which had been construed in *Brown* v. *Walker*, 161 U. S. 591. As this court pointed out in *Shapiro* v. *United States*, 335 U. S. 1, all immunity provisions included thereafter in the major regulatory enactments were framed in substantially the same terms as that statute (Title 49 U. S. C. Sec. 46).

The Compulsory Testimony Act of 1893 provided that "*no person* shall be excused from complying with a subpoena upon the ground of possible self-incrimination", and it added, "But *no person* shall be prosecuted" for any matter as to which he may testify. The mere act of testifying under subpoena automatically resulted in immunity. It was not necessary for the witness to claim his privilege (*United States* v. *Monia*, 317 U. S. 409).* Immunity attached to all subpoenaed witnesses, the guilty and the innocent, those with knowledge and those without, those under suspicion and those above reproach. The immunity resulted from the legislative enactment. It was not created by any man, and it could not be defeated by any man. Except for the power which every prosecutor possesses,—

* Subsequent to *Burdick* v. *U. S.*, some statutes were enacted which did require a witness to claim his privilege in order to win immunity.

to issue, or refrain from issuing, a subpoena,—the prosecutor plays no role in determining whether immunity is to be granted or withheld. Not the identity of the witness, nor the nature of his connection with the matter under investigation, nor the relative importance of the testimony he may give, nor the possibility of his indictment,—no such facts are involved in the grant of immunity.

That is what this court meant in the *Burdick* case when it said that legislative immunity "is the unobstrusive act of the law giving protection against a sinister use of his testimony * * *"; that "amnesty is usually general"; that it carries no imputation of guilt; and leaves the witness in "oblivion".

A pardon, it was held in *Burdick*, is basically different in that instead of being general in its impact, it was an individual grant to a specified person. Instead of being the automatic result of an exercise of the legislative power, it is an act of the executive, "the power intrusted with the execution of the laws". A pardon "carries an imputation of guilt". For those reasons, said this court, one to whom a pardon is tendered has the privilege of rejecting it, whereas one to whom legislative immunity attaches has no corresponding privilege.

The immunity here under consideration is neither a pardon nor legislative immunity. True, it results from legislation. But that does not make it legislative immunity any more than a prosecution for violation of a statute would be a "legislative" prosecution. The immunity under the present statute is an executive grant under authority conferred by the legislature. It is far closer to a pardon than it is to legislative immunity. Especially in the present case, it possesses all of the attributes of a pardon which influenced this court in the *Burdick* case. That it carries an imputation of guilt follows not only

from the nature of the statute and the manner in which it was applied to the petitioner but also from the history of accusations in the same criminal area made against the petitioner by the government over a period of many years. Consequently, under the principle of the *Burdick* case, petitioner properly rejected the tendered immunity and retained his privilege against self-incrimination.

IV

The power conferred by the statute to grant immunity is limited to "national security" investigations, as this court said in the *Ullmann* case. Moreover, the history of the statute, the congressional debates preceding its enactment and its justification by the government in the *Ullmann* case, all reveal that the purpose of the grant of immunity is to protect our nation from great dangers such as treason, espionage and the like. It is a present danger to guard against which the Justice Department was clothed with the power of immunization. Of course, a past violation may be so related to a present danger as to come within the scope of the statute. That is not claimed here. The investigation concerns, says the respondent, "espionage in wartime"; and all the questions put to petitioner referred to the years 1941 to 1945. It has not been suggested that any existing state of affairs has any relation to the acts alleged to be under investigation.

The question arises whether any investigation of the subjects set forth in the statute, however remote in time and however divorced from danger to the national security, may properly be the subject of a grant of immunity under the 1954 law. To ignore this question is to pervert a statute enacted for a limited purpose into one of more general application. Should the Justice Department exercise the right to immunize criminals in investigations of ancient offenses without regard to any threat to our national security, it would be usurping a power which Congress obviously never intended to grant.

It is no answer to this argument to state that the district judge will not review the prosecutive determination as to what poses a present threat to national security. The fact remains that in the present case no present threat to national security has been even claimed by the respondent. On the contrary, the application reveals that the acts alleged to be under investigation all occurred from ten to fifteen years ago.

Unless the Attorney General is to be given *carte blanche* to apply the statute without reference to the national security, this court must define the constitutional and statutory limits imposed upon him.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Milton H. Friedman,
Attorney for Petitioner.

APPENDIX I

Opinion in the Court of Appeals

Per Curiam:

This is an appeal from a judgment convicting appellant of contempt of court as a result of his refusal to testify before a grand jury in conformity with an order issued under authority of the Compulsory Testimony Act of 1954, 18 U. S. C. Sec. 3486, as amended. On July 25, 1955, the United States Attorney presented to Judge Dawson an application for an order instructing appellant to answer questions which he had refused to answer before a grand jury and to testify and produce evidence pursuant to the provisions of this recently enacted immunity statute. The application described the subject matter of the grand jury inquiry, set forth the questions asked appellant by the grand jury, and stated that he refused to answer the questions on the ground that his answers might tend to incriminate him. It also averred that in the judgment of the United States Attorney the testimony of the appellant was necessary to the public interest, and that it was being made with the approval of the Attorney General, whose letter of approval was attached.

Appellant cannot, as he argues, be relieved of the compulsion to testify by reason of his express rejection of the immunity conferred under the statute. See *Ullmann* v. *United States*, 350 U. S. 422; *Burdick* v. *United States*, 236 U. S. 79, 94. Nor was he entitled to a hearing looking behind the asserted judgment of the Attorney General into the motives. All the statutory requirements were found to exist by Judge Dawson, and he designated the questions to be answered with sufficient particularity to sustain the finding of contempt later made by Judge Walsh. All questions of substance here were settled adversely to the appellant by the *Ullmann* decision in March.

APPENDIX II

Pardon Power in Article II, Sec. 2 of the Constitution

The President * * * shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Due Process Clause of the Fifth Amendment to the Constitution

No person shall * * * be deprived of life, liberty, or property without due process of law.

Title 28 U. S. C. Sec. 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Title 18 U. S. C. Sec. 3486(c) and (d)

(c) Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60 Stat. 755), as amended, violations of sections 22(a) (27), (28), (29) or 241(a) (6) (7) or 313(a) of the Immigration and Nationality Act (66 Stat. 182-186;

204-206; 240-241), and conspiracies involving any of the foregoing, is necessary to public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

(d) No witness shall be exempt under the provision of this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Title 18 U. S. C. Sec. 401

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience of resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(b), Federal Rules of Criminal Procedure

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 293

EDWARD J. FITZGERALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 27) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1956. The petition for a writ of certiorari was filed on July 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, at a hearing on a United States Attorney's application for an order directing petitioner to testify before a grand jury under the Immunity Act of 1954, was given an adequate op-

portunity to show (a) that the grand jury's investigation did not relate to espionage and (b) that it was not in fact the United States Attorney's judgment that petitioner's testimony was necessary to the public interest.

2. Whether petitioner, after the court's order granting the United States Attorney's application, was excused from answering the questions listed in the application because they were not listed in the order.

3. Whether the immunity granted by the Immunity Act of 1954 is a "legislative immunity" as distinguished from a "pardon" so that its acceptance by the witness is not a prerequisite to its validity.

4. Whether the grand jury provision of the Immunity Act of 1954 is limited in scope to investigations concerning present—as distinguished from past—threats to national security.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U. S. C. (Supp. II) 3486 (c) provides:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage, sedition, seditious conspiracy, violations of chapter 115 of title 18 of the United States Code, violations of the Internal Security Act of 1950 (64 Stat. 987), violations of the Atomic Energy Act of 1946 (60

> Stat. 755), as amended, violations of sections 212 (a) (27), (28), (29) or 241 (a) (6), (7) or 313 (a) of the Immigration and Nationality Act (66 Stat. 182–186; 204–206; 240–241), and conspiracies involving any of the foregoing, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in subsection (d) hereof) against him in any court.

Other pertinent statutory and constitutional provisions are set forth in the petition for certiorari (Pet. 28–30).

STATEMENT

On July 20, 1955, in response to a subpoena, the petitioner appeared before a grand jury of the Southern District of New York (R. 15a).[1] This grand jury

[1] The record filed by the petitioner, the appendix to his brief in the Court of Appeals, is referred to as "R. —".

was inquiring into matters involving the interference with and endangering of, and plans and attempts to interfere with and endanger, the national security and defense of the United States by espionage and conspiracy to commit espionage in time of war in the Southern District of New York and elsewhere (R. 15a). Before the grand jury, petitioner refused to answer various questions relating to the subject matter of the inquiry on the ground that his answers might tend to incriminate him (R. 20a).

On July 25, 1955, the United States Attorney for the Southern District of New York applied to the court for an order instructing the petitioner to answer the questions which he had refused to answer before the grand jury and to testify and produce evidence pursuant to the provisions of the Immunity Act of 1954, 18 U. S. C. (Supp. II) 3486 (c) (R. 14a–15a). The application described the subject matter of the inquiry, set forth the specific questions asked the petitioner by the grand jury, and stated that he refused to answer these questions asserting that his answers might tend to incriminate him (R. 15a–20a). The application averred that petitioner's testimony, in the United States Attorney's judgment, was necessary to the public interest of the United States (R. 20a–21a), and that the application was made with the approval of the Attorney General, whose letter of approval was attached to the written application (R. 21a; G. Ex. A).

When the application was presented, petitioner's attorney moved for an adjournment (R. 23a). When asked by the court why additional time was needed,

petitioner's counsel stated that he needed the time to establish that it was not in fact the judgment of the United States Attorney that his client's testimony was necessary. In this connection, petitioner's counsel stated that he wished to show that the statements of J. Edgar Hoover, Director of the Federal Bureau of Investigation, of Herbert Brownell, Jr., Attorney General of the United States, and of the chairman and members of the Senate Internal Security Subcommittee, indicated that they did not accept the truth of Elizabeth Bentley's testimony, allegedly the sole source of information against petitioner (R. 34a–35a). He further stated that they were using this case as a "campaign maneuver" and a "political football." (R. 33a.)

In response to the trial judge's direct question, the United States Attorney specifically stated that it was in fact his own judgment that petitioner's testimony was necessary to the matters under inquiry (R. 29a; see also R. 20a–21a). The trial court found no merit to petitioner's offer of proof (R. 34a), pointing out that petitioner was attempting to put in issue the good faith of the United States Attorney (R. 35a). Accordingly, Judge Dawson signed the requested order (R. 36a) directing petitioner to appear before the grand jury on July 29, 1955, and, subject to the provisions of the Act, to answer the questions propounded to him before the grand jury and to testify and produce evidence with respect to the matters under inquiry (R. 10a).

Pursuant to this order, petitioner appeared before the grand jury on July 29, 1955 (R. 84a, 85a, 87a),

and refused to answer the same questions that had been propounded to him by the grand jury on July 20, 1955, and which the court had ordered him to answer (R. 93a–101a). Petitioner based his refusal "on advice of counsel on the ground that it might tend to incriminate me" (R. 93a; see also 93a–102a). That afternoon an order was signed requiring petitioner to show cause why he should not be held in criminal contempt for knowingly and deliberately disobeying the court's order (R. 37a–38a, 44a).

On August 11 and 12, 1955, petitioner served subpoenas on Elizabeth Bentley, J. Edgar Hoover, and Herbert Brownell, Jr., requiring their presence on August 18, 1955, to testify in the contempt hearings (R. 50a, 71a–72a). Complying with an order directing petitioner to show cause why these subpoenas should not be quashed, petitioner submitted an affidavit in opposition (R. 50a–61a), setting forth all of the matters that petitioner sought to establish through the testimony of the three persons subpoenaed (R. 103a). The affidavit stated that through their testimony petitioner intended to prove that the grand jury was not investigating espionage, that the source of the information against him was Elizabeth Bentley, that her entire story was a series of falsifications, that the Department of Justice knew prior to its application for an immunity order that he would give no testimony, and that the United States Attorney and the Attorney General had not formed the judgment alleged in the application, or, if they had, such judgment was exercised arbitrarily and capriciously

and without any factual basis therefor (R. 54a–57a). The affidavit also stated that petitioner also desired testimony from the United States Attorney and possibly from the Special Assistant to the Attorney General prosecuting the case (R. 53a). Judge Walsh ruled that, since the testimony sought to be elicited by petitioner was not within any of the issues of the contempt proceeding, he would grant the motion to quash the subpoenas (R. 80a–81a).

On August 18, 1955, the application to punish petitioner for contempt of court was heard and granted by Judge Walsh, and judgment convicting petitioner of contempt of court and sentencing him to six months in prison with opportunity to purge was entered (R. 115a). In a *per curiam* opinion, the Court of Appeals for the Second Circuit unanimously affirmed the conviction (Pet. 27).

ARGUMENT

In *Ullmann* v. *United States*, 350 U. S. 422, this Court upheld the constitutionality of the Immunity Act of 1954, 18 U. S. C. (Supp. II) 3486. The application and order in this case are substantially identical to those involved in *Ullmann*. Petitioner does not challenge the constitutionality of the statute (*supra*, pp. 2–3), but rather its application to him and the procedure used in granting him immunity.

1. In language paralleling the terms of the statute, the United States Attorney's application to the district court for an immunity order averred, *inter alia*, (a) that the grand jury's investigation related to

possibl espionage offenses, and (b) that it is the United States Attorney's judgment that petitioner's testimony is necessary to the public interest. Petitioner complains (Pet. 12–19) that the District Court denied him an adequate opportunity to challenge the correctness of those averments.

(a). That the grand jury's investigation related to possibl espionage offenses is apparent from even a glance at the transcript of the grand jury proceedings (R. 85a–103a). Each of the questions which petitioner refused to answer, moreover, pertained to such offenses (R. 3a–8a, 87a–102a). In these circumstances, no real issue of fact was presented concerning the nature of the grand jury investigation.

(b). Similarly, on the basis of objective standards, here can be no doubt that it *is* the judgment of the United States Attorney that petitioner's testimony s necessary to the public interest. The United States Attorney, as already noted, so stated in his application and, in addition, so stated in open court in answer to a question by the trial judge. Thus, what petitioner actually attacks is not the sufficiency of the application but rather the good faith of the United States Attorney. As petitioner has candidly conceded (R. 35a), the inquiry he proposes would deal with the motives of the United States Attorney in filing the application. In this connection, petitioner stated (R. 33a–35a) that he would attempt to show that the grand jury investigation was based on information supplied by Elizabeth Bentley and

that the Department of Justice has not "by any action * * * accepted the truth of that [information], but have, instead, used it whenever they felt it necessary or around election time * * *" (R. 35a).

The District Court and the Court of Appeals correctly held that this type of proof would not affect the grant of immunity. Petitioner's contention is almost identical to one rejected by this Court in the *Ullmann* case, *supra*. It was there held (350 U. S. at 432–433) that "A fair reading of § (c) [of the Act] does not indicate that the district judge has any discretion to deny the order on the ground that the public interest does not warrant it". Nor is there anything in the statute to indicate that a trial court has any authority to look behind the stated position of the United States Attorney as to the necessity of certain testimony to the public interest. The *Ullmann* ruling, which forbids inquiry into alleged arbitrariness of the United States Attorney's view of the public interest, cannot be circumvented by the mere device of contending that the United States Attorney does not really mean what he says. The teaching of *Ullmann* is that the district court's function "is only to ascertain whether the statutory requirements are complied with by the grand jury, the United States Attorney, and the Attorney General" (350 U. S. at 434)—not to review the motivation for their actions.

2. Petitioner next challenges his contempt conviction on the ground (Pet. 5–6, 18–21) that Judge Dawson's order granting the United States Attorney's application did not specifically enumerate the ques-

tions to be answered. The order, after noting petitioner's refusal "to answer certain questions relating to matters under inquiry before said Grand Jury and specifically set forth in the aforesaid application" (R. 11a), instructed petitioner "to answer the questions propounded to him before the Grand Jury and to testify and produce evidence with respect to such matters under inquiry before said Grand Jury" (R. 12a). Petitioner would construe the order as not being limited to the questions "specifically set forth in the aforesaid application."

However, even if the immunity order were as broad as he contends, petitioner still would not be excused from answering questions on his return to the grand jury room. Under the Act, such an order would give immunity to petitioner as to *any* question within the orbit of the inquiry. In the absence of a pertinency objection, no purpose would be served by clearing additional questions with the trial judge, since by hypothesis the immunity order is broad enough to cover all such questions.

In any event, at the very minimum, Judge Dawson's order must extend to the questions specifically enumerated in the United States Attorney's application. Since petitioner refused to answer any of these questions, and indeed refused to answer any question at all, the alleged breadth of the order is hardly material. Regardless of whether petitioner could refuse to answer questions other than those specified in the

United States Attorney's application, he was obliged to answer those which had been so specified.[2]

3. Relying on *Burdick* v. *United States*, 236 U. S. 79, petitioner further contends (Pet. 22–24) that under the Act he had a right to refuse the proffered immunity and thus retain his privilege against self-incrimination. In the *Burdick* case, this Court pointed out the distinction between a pardon (which must be accepted) and a legislative immunity (which need not be accepted). 236 U. S. at 94. A pardon, the Court held, "carries an imputation of guilt; acceptance a confession of it," whereas a legislative immunity "has no such imputation or confession." Petitioner concedes that immunity legislation such as the Compulsory Testimony Act of 1893, upheld in *Brown* v. *Walker*, 161 U. S. 591, falls in the latter category (Pet. 22). Petitioner likewise concedes that the immunity provided by the present statute is not a pardon (Pet. 23). Nevertheless, he urges that it is also not a legislative immunity and that he therefore could elect whether to accept it or not.

This contention, even apart from the fact that petitioner cites nothing in the statute or legislative history to support it, is wholly without substance. Petitioner attempts to distinguish legislation such as the

[2] *Carlson* v. *United States*, 209 F. 2d 209 (C. A. 1), cited by petitioner, furnishes no support for his position. In *Carlson*, the court, after the defendant refused to answer questions put to him by the grand jury, convicted him of contempt without first ordering him to answer the specific questions. Here petitioner was returned to the grand jury room after appearing before Judge Dawson, and was given another opportunity to answer.

Compulsory Testimony Act of 1893 on the ground that the immunity statute involved here does not come into play until a witness invokes his privilege against self-incrimination. According to petitioner, the immunity provided by the present statute "carries an imputation of guilt" (Pet. 23). But this is simply saying that a witness who invokes his privilege against self-incrimination is either guilty or a perjurer. Such a contention must be rejected in the light of recent decisions by this court. See *Ullmann* v. *United States, supra*, 350 U. S. at 426–427; *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 556–558; *Quinn* v. *United States*, 349 U. S. 155, 161–162. Thus, under the rationale of the *Burdick* decision itself, petitioner's acceptance of the immunity was not a prerequisite to its validity.

Nor is it material that under the present statute a prosecutor must initiate the immunity procedure. Under the Compulsory Testimony Act of 1893, as well as under similar statutes (see *Shapiro* v. *United States*, 335 U. S. 1, 6–7, footnote 4), the prosecutor must also initiate the immunity procedure, there by issuance of any appropriate subpoena. In both instances, the immunity arises by operation of law when specified statutory conditions have been met.

4. Finally, without referring to either statutory or decisional authority, petitioner contends (Pet. 24–25) that the Act cannot be validly applied to him because the grand jury before which he appeared

was not investigating a *present* threat to the national security.

No such limitation on the scope of the Act exists. On the contrary, the statute expressly applies to "any case or proceeding before any grand jury or court of the United States involving any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense of the United States by treason, sabotage, espionage [etc.]." As already noted (*supra*, p. 8), the grand jury's investigation in the instant case was plainly of this type.

Assuming, *arguendo*, that a present threat to the national security must be under investigation by the grand jury before immunity may be granted under the statute, such an investigation was being conducted when petitioner was interrogated. As petitioner admits (Pet. 24), a past violation may be a prologue to a present threat. Without petitioner's special knowledge, the Government cannot agree that there is no present danger from those persons about whom he was questioned. If petitioner had complied with the court's order to testify after immunity had been granted, the Government would have been able to ascertain, among other things, whether or not the suspected individuals were still a menace to the national security. Petitioner can not refuse to give testimony which would aid in determining whether a present threat exists, and at the same time justify his refusal on the ground that the Government has failed to show the existence of such a threat.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1956.

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